Supreme Court, U.S.
FILED
OCT 16 2000
CLERK

(2)

00-400

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 2000

---

JOHN KEANE, Superintendent of Woodbourne Correctional Facility,

*Petitioner,*

- v. -

RAFAEL FLORES,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## MOTION TO PROCEED *IN FORMA PAUPERIS* AND BRIEF IN OPPOSITION

---

**RICHARD M. GREENBERG**
*Counsel of Record*
OFFICE OF THE APPELLATE DEFENDER
45 West 45th Street, 7th Floor
New York, New York 10036
(212) 719-0766
*Attorney for Respondent*

JESSICA S. HENRY, ESQ.
Of Counsel

October 12, 2000

19 pp

00-400

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 2000

---

JOHN KEANE, Superintendent of Woodbourne Correctional Facility,

*Petitioner,*

- v. -

RAFAEL FLORES,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## MOTION TO PROCEED *IN FORMA PAUPERIS*

---

Respondent, Rafael Flores, asks leave to file the attached Brief in Opposition to a Petition for a Writ of Certiorari, and to proceed *in forma pauperis*. Respondent has been granted leave to so proceed throughout his appeals in the courts of the State of New York, as well as in the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit. Undersigned counsel was appointed to represent respondent in both the district court and the court of appeals below pursuant to the Criminal Justice Act. Respondent's declaration in support of this motion is attached hereto.

RICHARD M. GREENBERG
*Attorney for Respondent*

DECLARATION IN SUPPORT OF
MOTION TO PROCEED *IN FORMA PAUPERIS*

I, Rafael Flores, do hereby declare and state that I am the Respondent in the above-entitled case; that in support of my motion to proceed as a poor person, I state that because of my poverty I am unable to pay the costs of said case; and that I believe I am entitled to redress.

I further swear that the statements which I have made below relating to my ability to pay the cost of proceeding in this Court are true.

1. I am currently incarcerated in the custody of the New York State Department of Correctional Services, and have been so incarcerated for approximately the past ten years. I have approximately $ 126.00 in my inmate savings account.

2. I have not received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or any other like source. I recieve $188.00 per month from the U.S. Veterans Adainistration.

3. I have no bank account or other savings.

4. I do not own any real estate, motor vehicles, stocks, bonds, notes, or any other valuable property.

5. There are no persons who are dependent upon me for support.

I declare under penalty of perjury that the foregoing is true and correct.

RAFAEL FLORES

Sworn to before me this
21st day of September, 2000.

NOTARY PUBLIC

RICHARD M. GREENBERG
Notary Public, State of New York
No. 31-4670365
Qualified in New York County
Commission Expires August 31, 2002

00-0400

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 2000

---

JOHN KEANE, Superintendent of Woodbourne Correctional Facility,

*Petitioner,*

- v. -

RAFAEL FLORES,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## BRIEF IN OPPOSITION

---

**RICHARD M. GREENBERG**
*Counsel of Record*
OFFICE OF THE APPELLATE DEFENDER
45 West 45th Street, 7th Floor
New York, New York 10036
(212) 719-0766
*Attorney for Respondent*

JESSICA S. HENRY
*Of Counsel*

October 12, 2000

## QUESTION PRESENTED

Should this Court should grant the State's petition for certiorari, in this fact-specific case, which pre-dates the Anti-Terrorism and Effective Death Penalty Act of 1996, where the State offers no compelling reason for its request that this Court dramatically expand the doctrine of Stone v. Powell, where the State never raised this argument in any court below, and where the Second Circuit did not exceed its authority in resolving Rafael Flores's claim that he was denied the effective assistance of counsel under the Sixth Amendment?

## TABLE OF CONTENTS


QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 1

A. The Rosario Violation ..... 1

B. Procedural History ..... 2

1. State Court Proceedings ..... 2

a. Mr. Flores's Request for Collateral Review ..... 2

b. Mr. Flores's Direct Appeal ..... 3

2. Federal Court Proceedings ..... 4

a. The Magistrate Court Proceedings ..... 4

b. The District Court Proceedings ..... 5

c. The Second Circuit Decision ..... 6

REASON FOR DENYING THE PETITION

THIS COURT SHOULD DENY THE PETITION FOR CERTIORARI, IN THIS FACT-SPECIFIC CASE, WHICH PRE-DATES THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, WHERE THE STATE OFFERS NO COMPELLING REASON FOR THIS COURT TO DRAMATICALLY EXPAND THE DOCTRINE OF STONE V. POWELL, WHERE THE STATE NEVER RAISED THIS ARGUMENT IN ANY COURT BELOW, AND WHERE THE SECOND CIRCUIT DID NOT EXCEED ITS AUTHORITY IN RESOLVING RAFAEL FLORES'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT. ..... 8

CONCLUSION ..... 12

## TABLE OF AUTHORITIES

CASES


Flores v. Demskie, 11 F.Supp.2d 299 (S.D.N.Y. 1998) ..... 5, 6

Flores v. Demskie, 215 F.3d 293 (2d Cir. 2000) ..... 6, 7

Jackson v. Virginia, 443 U.S. 307 (1979) ..... 10

Kimmelman v. Morrison, 477 U.S. 365 (1986) ..... 8-10

Lindh v. Murphy, 521 U.S. 320 (1997) ..... 4

Miranda v. Arizona, 384 U.S. 436 (1966) ..... 9

People v. Flores, 194 A.D.2d 439, 599 N.Y.S.2d 255 (1st Dep't 1993) ..... 3

People v. Flores, 84 N.Y.2d 184, 615 N.Y.S.2d 662 (1994) ..... 3

People v. Ranghelle, 69 N.Y.2d 56, 511 N.Y.S.2d 580 (1986) ..... 1

People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448, cert. denied, 368 U.S. 866 (1963) ..... 1

People v. Young, 79 N.Y.2d 365, 582 NY.S.2d 977 (1992) ..... 7

Reed v. Farley, 512 U.S. 339 (1994) ..... 9

Rose v. Mitchell, 443 U.S. 545 (1979) ..... 9

Stone v. Powell, 428 U.S. 465 (1976) ..... 8, 9

Strickland v. Washington, 466 U.S. 668 (1984) ..... 5, 9

Williams v. Taylor, ___ U.S. ___, 120 S.Ct. 1495 (2000) ..... 9

Withrow v. Williams, 507 U.S. 680 (1993) ..... 9

## STATEMENT OF THE CASE

### A. The Rosario Violation

Under New York's long-standing Rosario rule, see People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448, cert. denied, 368 U.S. 866 (1963), the prosecution is required to provide to the defense any written or recorded statements made by a person whom the prosecution intends to call as a witness at trial, relating to the subject matter of the witness's testimony. Failure by the prosecution to turn over that material is per se reversible error and is not subject to harmless error analysis. See People v. Ranghelle, 69 N.Y.2d 56, 511 N.Y.S.2d 580 (1986).

In this case, the prosecution failed to disclose to the defense a police memo book containing handwritten notes by Police Officer Karen Pabon about her initial investigation and a version of the incident as described to Pabon by Carmen Santiago, the complainant's mother. Since the source of the recorded statement was Ms. Santiago, who testified as a prosecution witness at trial, the memo book was classic Rosario material which the prosecution was obligated to disclose to the defense. Despite defense counsel's repeated requests for the missing Rosario material and the trial court's repeated orders that the prosecutor produce it, the memo book was not turned over. Over specific defense objection regarding the missing Rosario material, the case was sent out for verdict. On November 9, 1990, the jury convicted Rafael Flores of four counts of sodomy in the first degree.

After the verdict, but before sentencing, the prosecutor finally produced the previously withheld police memo book. Although Mr. Flores clearly would have been entitled under New York law to a new trial, defense counsel did not move to set aside the verdict based on the Rosario violation. Instead, counsel unnecessarily and without any justification failed to preserve Mr.

Flores's rights under the Rosario rule and forfeited a guaranteed vacatur of the verdict under New York law.

Mr. Flores was sentenced to concurrent prison terms of five to fifteen years on each count. He has served ten years of that sentence.

B. Procedural History

1. State Court Proceedings

a. Mr. Flores's Request for Collateral Review

After appellate counsel was assigned, Mr. Flores moved to vacate the judgment of conviction pursuant to N.Y. Crim. Proc. Law § 440.10 (McKinney 1987) ("the 440 motion"). Mr. Flores's resort to § 440.10, i.e., a post-conviction collateral attack on the judgment, was required since the Rosario material itself was not part of the record leading to judgment.

Mr. Flores raised two claims in the 440 motion. First, Mr. Flores argued that he had been denied his state and federal constitutional rights to the effective assistance of counsel when his attorney failed to move to set aside the verdict on the preserved Rosario issue, and when his attorney inexplicably waived Mr. Flores right to a new trial. Second, Mr. Flores argued for vacatur of his sentence on the Rosario violation itself.

In support of this motion, Mr. Flores submitted an affidavit by trial counsel (the "affidavit") in which counsel swore that his failure to request a new trial based on the Rosario violation was based upon his misunderstanding of then well-established law:

> I was not aware that the failure to turn over the memo book, unless waived, was per se reversible error that would have required vacatur of Mr. Flores's conviction. I believed that to prevail on a Rosario claim I would have to show prejudice.

This affidavit eliminated the possibility that counsel's actions were motivated by any strategic consideration.

The trial judge denied Mr. Flores's motion without a hearing. Mr. Flores's request for leave to appeal the denial of the 440 motion was denied by a Justice of the Appellate Division of the Supreme Court of the State of New York, First Department (hereinafter "the Appellate Division"). Under New York law no further review of the denial of the 440 motion was available. As a result of that denial, counsel's affidavit could not, and did not, become part of the record on direct appeal.

b. Mr. Flores's Direct Appeal

Mr. Flores raised two claims in the Appellate Division. The first was that he was denied the effective assistance of counsel under both the federal and state constitutions. Mr. Flores also argued, in the alternative, for reversal of his conviction based on the actual Rosario violation. The Appellate Division affirmed Mr. Flores's conviction on June 17, 1993. See People v. Flores, 194 A.D.2d 439, 599 N.Y.S.2d 255 (1st Dep't 1993). Although its ruling was on the merits, the Appellate Division assumed, but did not decide whether, the memo book constituted Rosario material; nor did it remand the case for a hearing on that issue.

Mr. Flores then appealed his conviction to the Court of Appeals of the State of New York. As in the Appellate Division, Mr. Flores alleged, under both the federal and state constitutions, that he received ineffective assistance of counsel when his attorney discarded a Rosario violation that was per se reversible error. The Court of Appeals, in a 5-2 decision, affirmed the Appellate Division's order on July 7, 1994. See People v. Flores, 84 N.Y.2d 184, 615 N.Y.S.2d 662 (1994). The court, deciding "the sole dispositive issue" in this case, and without the benefit of defense counsel's affidavit, found that Mr. Flores had not been denied the effective assistance of counsel. Id. at 186, 615 N.Y.S.2d at 663. In determining the ineffective assistance of counsel issue, the court

also assumed, but did not decide whether, the police officer's memo book was Rosario material. The two dissenting judges would have found that Mr. Flores had been denied effective assistance of counsel.

2. Federal Court Proceedings

On April 17, 1996, Rafael Flores filed a petition for a writ of habeas corpus, stating that he had been denied his federal constitutional right to the effective assistance of counsel when his lawyer, after conviction but prior to sentencing, waived a per se reversible trial error.[1]

Mr. Flores specifically pleaded that his attorney's failure to move for a new trial was ineffective: first, that counsel's failure to move to set aside the verdict based on the Rosario violation fell below an "objective standard of reasonableness," and second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different," i.e., Mr. Flores's conviction would automatically have been set aside and a new trial ordered.

a. The Magistrate Court Proceedings

Assuming the memo book to be Rosario material, the magistrate court found that defense counsel's post-conviction waiver of Mr. Flores's substantive right to a new trial was "objectively unreasonable," but nonetheless recommended that the petition be denied because it concluded that Mr. Flores had not been prejudiced by his lawyer's deficient performance. The magistrate court reached this conclusion based on an incorrect standard for prejudice, which it believed varied when the challenge was based upon the performance of trial, rather than appellate, counsel. Applying its

[1]Due to the filing date of the petition, Mr. Flores's case is not subject to the revised standards for habeas review under the Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"). See Lindh v. Murphy, 521 U.S. 320 (1997).

erroneous prejudice standard to counsel's post-conviction waiver of the Rosario claim, the magistrate concluded that counsel's unreasonable performance, nonetheless, did not warrant relief.

b. The District Court Proceedings

The district court denied Mr. Flores's petition for a writ of habeas corpus. See Flores v. Demskie, 11 F.Supp.2d 299 (S.D.N.Y. 1998). While the district court agreed with the magistrate's finding that counsel's performance was "objectively unreasonable," the court, however, rejected the magistrate court's erroneous distinction between trial- and appellate-based ineffective assistance of counsel claims. Instead, the court affirmed that the Strickland test for prejudice – whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different – is the relevant inquiry for ineffective assistance of counsel claims. See Strickland v. Washington, 466 U.S. 668, 694 (1984). Under this standard, if the memo book constituted Rosario material, Mr. Flores was denied the effective assistance of counsel by counsel's failure to move to set aside the verdict and obtain a new trial. The district court thus ordered an evidentiary hearing to resolve the issue which no state court previously had determined: whether the source of the statements memorialized in the police memo book was in fact a witness who testified at trial.

Two witnesses testified at the evidentiary hearing. The testimony of those witnesses proved that the complainant's mother, a prosecution witness at trial, was the source of the withheld statements. See Flores, 11 F.Supp.2d at 307-309.

The court concluded that "the memo book, considered in isolation, does contain Rosario material with respect to the victim's mother." Id. at 308. The court, however, raised sua sponte the question of whether the statements contained in the memo book were merely the "duplicative equivalent" of another previously disclosed document. Id. at 309. No other court, including any

state court, had addressed the issue of duplicative equivalence. Based upon its interpretation of New York law, the district court concluded that "the undisclosed memo book was the duplicative equivalent of the disclosed police report. Therefore, there is no basis for finding that a new trial would have been granted here, even if Flores's counsel had moved for one." Id. at 314.

c. The Second Circuit Decision

On June 15, 2000, the United States Court of Appeals for the Second Circuit reversed the judgment of the district court and ordered the lower court to conditionally grant the writ. See Flores v. Demskie, 215 F.3d 293 (2d Cir. 2000). The court, in an opinion by Judge Straub joined by Judge Jacobs, analyzed "[Mr]. Flores's claim of ineffective assistance of counsel under the well-established rubric of Strickland v. Washington." Id. at 300. The court first turned to the same threshold issue identified by the district court and unresolved by any state court: whether the memo book was in fact Rosario material.

The Second Circuit reviewed for "clear error" the district court's factual determination, based on the facts adduced at the evidentiary hearing, that the source of the memo book statements was a witness who testified at trial. Id. After careful examination of the record, the Circuit Court upheld the district court's factual conclusions that the statements contained in the memo book were from the complainant's mother. Id. at 300-01.

The Second Circuit, however, rejected the district court's legal conclusion that the memo book was the duplicative equivalent of previously disclosed material. In a comprehensive review of New York law, id. at 301-03, the court found that the district court erroneously applied well-established New York law governing duplicative equivalence. Relying exclusively on controlling New York Court of Appeals precedent, Judge Straub explained that "two documents cannot be 'duplicative equivalents' if there are variations or inconsistencies between them." Id. at 302 (quoting

People v. Young, 79 N.Y.2d 365, 370, 582 NY.S.2d 977, 980 (1992)). Because there were clear variations between the two documents (as even the district court recognized), the memo book simply did not fall within the narrow duplicative equivalent exception to the Rosario rule. Thus, the Circuit Court concluded, the memo book was Rosario material, which should have been, but was not, turned over to defense. Flores, 215 F.3d at 303.

Having resolved that underlying factual issue, which had never been addressed by the state courts, the Second Circuit found that Mr. Flores was deprived of his Sixth Amendment right to the effective assistance of counsel when his counsel waived his right to a new trial due to counsel's admitted misunderstanding of New York law. Applying Strickland, the court first determined that counsel's performance was objectively unreasonable, since "the only basis for this waiver [of his client's right to a new trial] was counsel's misunderstanding of Rosario. . . ." Id. at 304. Further, because there was "a reasonable probability that the outcome would have been different," Mr. Flores demonstrated the required showing of prejudice. Id. at 305.

## REASON FOR DENYING THE PETITION

**THIS COURT SHOULD DENY THE PETITION FOR CERTIORARI, IN THIS FACT-SPECIFIC CASE, WHICH PRE-DATES THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, WHERE THE STATE OFFERS NO COMPELLING REASON FOR THIS COURT TO DRAMATICALLY EXPAND THE DOCTRINE OF STONE V. POWELL, WHERE THE STATE NEVER RAISED THIS ARGUMENT IN ANY COURT BELOW, AND WHERE THE SECOND CIRCUIT DID NOT EXCEED ITS AUTHORITY IN RESOLVING RAFAEL FLORES'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT.**

The State asks this Court to create a new rule of constitutional law by extending the restrictions on federal habeas review of Fourth Amendment claims as set forth in Stone v. Powell, 428 U.S. 465 (1976), to Sixth Amendment claims of ineffective assistance of counsel. At the outset, it should be noted that the State did not argue this issue below in either the district court or the Court of Appeals. In those courts, the State never argued that the rule of Stone v. Powell applied to, or should be extended to, the circumstances of Mr. Flores's case.

Significantly, the State raises no challenge to the Second Circuit's proper application of the law governing ineffective assistance of counsel claims. Moreover, the State concedes, as it must, that this Court has already refused to extend Stone to Sixth Amendment claims. See State Petition at 12 (citing Kimmelman v. Morrison, 477 U.S. 365, 374 (1986)). The State nonetheless suggests that this pre-AEDPA case requires this Court to revisit the issue presented in Kimmelman and "extend the doctrine enunciated in Stone," see State Petition at 10, simply because the underlying basis for counsel's ineffectiveness is his failure to properly invoke a principle of state law, albeit a well-settled rule that would have automatically resulted in a new trial. In the alternative, the State suggests that the Court of Appeals for the Second Circuit was not even empowered to resolve the Sixth Amendment claim because the underlying error rests upon state law. This issue also was not raised by the State in the courts below.

The State does not challenge the Second Circuit's application of existing law governing ineffective assistance of counsel claims. Nor could it. Writing for the Second Circuit, Judge Straub, in a well-reasoned opinion joined by Judge Jacobs, resolved the ineffective assistance of counsel claim by properly applying the standards set forth by this Court in Strickland v. Washington, 466 U.S. 668, 688 (1984). First, the court determined that counsel's failure to move to vacate his client's conviction, based on counsel's admitted misunderstanding of well-settled law, was "objectively unreasonable." Second, the court determined that Mr. Flores established constitutional prejudice, because there was "at least a reasonable probability" that Mr. Flores's conviction would have been vacated and a new trial ordered. This conclusion is clearly consistent with the Strickland doctrine, which this Court recently reaffirmed in Williams v. Taylor, ___ U.S. ___, 120 S.Ct. 1495 (2000).

Perhaps because the State cannot challenge the Second Circuit's legal reasoning under this Court's controlling precedent, the State instead invites this Court to dramatically expand the doctrine of Stone v. Powell. In Stone, however, this Court created a special rule limiting the availability of habeas corpus claims under the Fourth Amendment exclusionary rule. The Stone Court specifically noted the limited applicability of its holding. See Stone, 428 U.S. at 494 n.37. Since then, this Court has "repeatedly declined to extend the rule in Stone beyond its original bounds." Withrow v. Williams, 507 U.S. 680, 687 (1993) (refusing to extend Stone to prisoner's claim that statements were made in violation of the rule set forth in Miranda v. Arizona, 384 U.S. 436 (1966)); see Reed v. Farley, 512 U.S. 339 (1994) (refusing to extend Stone to state court's failure to adhere to speedy trial rule under the Interstate Agreement on Detainers); Kimmelman, 477 U.S. 365 (refusing to extend Stone to ineffective assistance of counsel claims); Rose v. Mitchell, 443 U.S. 545 (1979) (refusing to extend Stone to claims of racial discrimination in the selection of grand jury foremen);

Jackson v. Virginia, 443 U.S. 307, 321-324 (1979) (refusing to extend Stone to claim of insufficiency of the evidence supporting conviction).

Indeed, in Kimmelman, this Court declined to expand the scope of Stone to Sixth Amendment ineffective assistance of counsel claims where the alleged error was counsel's failure to raise a search and seizure claim. Thus, the basic underlying premise of the State's petition has already been considered and rejected by this Court.

The State offers no compelling reason why this Court should adopt a startling new rule which would prohibit all claims of ineffective assistance of counsel under the Sixth Amendment where the ineffective assistance is counsel's failure to protect the client's rights under clearly-established state law. See State Petition at 12. Yet, under the State's novel proposal, a criminal defendant's right to federal review of Sixth Amendment ineffective assistance of counsel claims would be entirely eviscerated. Moreover, even if this Court were inclined to adopt such a sweeping new rule of law, this pre-AEDPA, fact-bound case does not present an appropriate vehicle to do so. Nor does the Second Circuit's limited ruling in this case posit any issue of national importance.

The State also argues that the Second Circuit "did not show proper restraint" in resolving Mr. Flores's Sixth Amendment claim. Indeed, the State suggests that the Second Circuit "usurped the right of New York courts to have the final say on the scope of New York law." State Petition at 10. This argument makes no sense. As both the Second Circuit and the district court recognized, it was impossible to resolve the federal claim under the Sixth Amendment until the open factual state issue was resolved, which, through no fault of Mr. Flores, was never addressed by a reviewing state court. Federal courts certainly are empowered to reach previously unresolved factual issues in order to consider the dispositive federal constitutional question. Here, the state courts had all deferred the factual issue of whether the memo book constituted Rosario material, since they erroneously and

unreasonably concluded that Mr. Flores could not prevail on his ineffective assistance claim. Taken to its logical conclusion, the State's proposed new rule would entirely strip federal courts of their power to ever review fact-based federal constitutional errors. And, of course, that does not accurately represent the pre-AEDPA state of law.

Moreover, as to the ineffective assistance of counsel issue, because the Appellate Division denied Mr. Flores's application for leave to appeal from his post-judgment collateral motion, counsel's affidavit, in which he admitted his complete ignorance of a basic rule of state law, was not part of the record on direct appeal. As a result, the New York Court of Appeals did not have a complete record before it and therefore did not properly resolve Mr. Flores's claim that he had been denied his federal constitutional right to the effective assistance of counsel. In this pre-AEDPA case, the federal courts certainly had the authority to apply well-established issues of state law – which were never addressed by state courts through no fault of Mr. Flores – in order to properly resolve the Sixth Amendment claim of error.

Because the Second Circuit acted well within its authority when it found that counsel was constitutionally ineffective for failing to raise an issue, through his own admitted ignorance of well-established law, which would have resulted in the vacatur of his client's conviction, this Court should deny the petition for certiorari.

## CONCLUSION

For all the reasons above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

RICHARD M. GREENBERG, ESQ.
*Counsel of Record*
OFFICE OF THE APPELLATE DEFENDER
45 West 45th Street, 7th Floor
New York, New York 10036
(212) 719-0766
*Attorney for Respondent*

JESSICA S. HENRY, ESQ.
*Of Counsel*

October 12, 2000